

**MAJLIS AGAMA ISLAM DAN ADAT MELAYU
PERAK DARUL RIDZUAN**

A

v.

MOHAMED SUFFIAN AHMAD SYAZALI & ANOR

B

COURT OF APPEAL, PUTRAJAYA

ABDUL AZIZ RAHIM JCA

MOHAMAD ARIFF YUSOF JCA

DAVID WONG DAK WAH JCA

[CIVIL APPEAL NO: A-02(IM)(NCVC)-3-01-2013]

C

10 JANUARY 2014

JURISDICTION: *High Court - Termination of respondent as chairman of kariah committee of mosque - Whether dispute concerned matter within jurisdiction of High Court - Whether dispute concerned application of Islamic law - Whether Syariah Court had jurisdiction to decide matter - Whether action should have been commenced by way of judicial review - Whether case involved public law elements - Rules of the High Court 1980, O. 53*

D

The appellant ('MAIP') had formally appointed the first respondent ('Suffian') as chairman of the *kariah* committee of a mosque for a three-year period. Mid-way through that period, the Perak Islamic Affairs Department ('JAIP') notified Suffian that his appointment had been terminated and that the second respondent replaced him. Suffian filed a writ action in the High Court for declaratory reliefs and damages against MAIP. He claimed that he continued to remain as the chairman of the committee since (a) JAIP had no authority to terminate his appointment; and (b) JAIP's action was unlawful, unconstitutional and in breach of natural justice as he was not given the opportunity to be heard. MAIP applied to strike out Suffian's action under O. 18 r. 19(1)(b) and/or (d) of the Rules of the High Court 1980 ('RHC') on the following grounds, *ie*, (i) that as the subject-matter of the dispute concerned the running of a mosque, the Syariah Court, and not the Civil Courts, had the jurisdiction to try the matter; and alternatively, (ii) that Suffian should have applied by way of judicial review under O. 53 of the RHC for an order of *certiorari* to quash the decision to terminate him since the dispute concerned public administrative law. In dismissing the application,

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- A the High Court held that it was the proper forum to hear the dispute as Suffian's dispute was premised on a termination of a contract of employment and he prayed for declaratory reliefs which the Syariah Court had no jurisdiction to grant. Hence, this appeal.
- B **Held (allowing the appeal; setting aside the decision of the High Court)**
Per Mohamad Ariff Yusof JCA delivering the judgment of the court:
- C (1) The dispute concerned whether Suffian's termination as chairman was lawful and had little to do with Islamic law in connection with mosques. It did not concern the qualifications of a person to act as *Imam* or *Bilal* under Islamic law but with Suffian's position as chairman of the mosque's *kariah* committee. This position was more administrative in character by virtue of him being a resident in the *kariah* (a defined area in which a mosque was situated). Although the subject matter concerned the administration of a mosque, the 'pith and substance' of the dispute was under administrative law for which the civil courts were the proper *fori*. The High Court's decision on the question of jurisdiction was therefore upheld. (paras 23, 34 & 35)
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- F (2) Given the structure of the Federal Constitution, there could well be areas of perceived overlapping jurisdictions between the Syariah and the Civil Courts. The essential issue to determine was what precisely was the 'core' or the 'pith and substance' of the subject-matter in dispute and not so much whether the Civil Courts had the correct and applicable remedy. (para 33)
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- H (3) It was plain from the wording of s. 50 of the Enakmen Pentadbiran Agama Islam (Perak) 2004, concerning the jurisdiction of Syariah Courts in Perak, that the Syariah Court had no express jurisdiction to adjudicate on a matter touching and concerning the appointment and termination of mosque officials or the members of the *Jawatankuasa Kariah Masjid*. (paras 27 & 28)

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- (4) Although the respondent's claim was couched in the language of applying for a declaration of his 'status', *ie*, that he remained the lawful chairman of the *Jawatankuasa Kariah Masjid* by reason of his appointment having been terminated by the wrong body and failure of natural justice, the case should have been filed as an application for judicial review under O. 53 of the RHC. The argument was wholly centred on public law in the absence of statutory jurisdiction on the part of JAIP and breach of the rules of natural justice. (paras 38 & 45) A
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- (5) It is an established proposition that a failure to comply with O. 53 of the RHC results in an abuse of process for which the claim can be struck out. (para 42) C

Bahasa Malaysia Translation Of Headnotes

Perayu ('MAIP') telah melantik responden pertama ('Suffian') sebagai pengerusi jawatankuasa kariah sebuah masjid bagi tempoh tiga tahun. Dalam pertengahan tempoh tersebut, Jabatan Hal Ehwal Agama Islam Perak ('JAIP') telah memaklumkan Suffian bahawa pelantikan beliau dibatalkan dan responden kedua telah mengambil alih tempatnya. Suffian telah memfailkan tindakan writ di Mahkamah Tinggi untuk relif deklaratori dan ganti rugi terhadap MAIP. Suffian menuntut bahawa beliau tetap meneruskan jawatannya sebagai pengerusi jawatankuasa tersebut memandangkan (a) JAIP tidak mempunyai kuasa untuk membatalkan pelantikannya; dan (b) tindakan JAIP adalah tidak sah, tidak berperlembagaan dan melanggar kaedah-kaedah keadilan asasi memandangkan beliau tidak diberi peluang untuk didengar. MAIP memohon untuk membatalkan tindakan Suffian di bawah A. 18 k. 19(1)(b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') berdasarkan alasan-alasan berikut, iaitu, (i) bahawa memandangkan hal perkara pertikaian adalah mengenai pentadbiran sebuah masjid, Mahkamah Syariah dan bukannya Mahkamah Sivil, mempunyai bidang kuasa untuk memutuskan perkara ini; dan secara alternatif; (ii) bahawa Suffian sepatutnya memohon untuk semakan kehakiman di bawah A. 53 KMT bagi perintah *certiorari* untuk membatalkan keputusan tersebut memandangkan pertikaian di sini adalah berkenaan undang-undang pentadbiran awam. Dalam menolak permohonan itu, Mahkamah Tinggi memutuskan bahawa ia adalah forum yang betul untuk mendengar pertikaian ini memandangkan pertikaian Suffian adalah berdasarkan penamatan kontrak pekerjaan D
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A dan beliau memohon relif deklaratori di mana Mahkamah Syariah tidak mempunyai bidang kuasa untuk membenarkannya. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; mengenenpikan keputusan Mahkamah Tinggi)

B Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

- C (1) Pertikaian adalah berkenaan sama ada penamatan Suffian sebagai pengerusi adalah sah dan hanya mempunyai sedikit kaitan dengan undang-undang Islam berkaitan dengan masjid. Ia tidak melibatkan kelayakan seseorang untuk mejadi Imam atau Bilal di bawah undang-undang Islam tetapi dengan pangkat Suffian sebagai pengerusi jawatankuasa kariah masjid tersebut. Kedudukan ini mempunyai sifat pentadbiran
- D memandangkan beliau adalah penduduk di kariah (tempat di mana masjid terletak). Walaupun hal perkara adalah berkenaan pentadbiran masjid, intipati pertikaian adalah di bawah undang-undang pentadbiran di mana Mahkamah Sivil adalah *fori* yang berpatutan. Keputusan Mahkamah Tinggi berkenaan persoalan
- E bidang kuasa dengan itu disahkan.
- F (2) Berdasarkan struktur Perlembagaan Persekutuan, terdapat kemungkinan pertindihan bidang kuasa di antara Mahkamah-mahkamah Syariah dan Sivil. Isu penting untuk ditentukan adalah 'teras' atau 'intipati' hal perkara dalam pertikaian dan tidak begitu banyak berkenaan sama ada Mahkamah-mahkamah Sivil mempunyai remedi yang betul dan boleh dipakai.
- G (3) Adalah jelas daripada s. 50 Enakmen Pentadbiran Agama Islam (Perak) 2004, berkenaan bidang kuasa Mahkamah-Mahkamah Syariah di Perak, bahawa Mahkamah Syariah tidak mempunyai bidang kuasa nyata untuk memutuskan perkara berkenaan pelantikan dan penamatan pegawai-pegawai masjid atau ahli Jawatankuasa Kariah Masjid.
- H (4) Walaupun tuntutan responden adalah untuk suatu deklarasi berkenaan statusnya, iaitu, bahawa beliau tetap merupakan pengerusi Jawatankuasa Kariah Masjid disebabkan pelantikannya telah ditamatkan oleh badan yang salah dan kegagalan keadilan asasi, kes ini sepatutnya difailkan sebagai suatu permohonan
- I untuk semakan kehakiman di bawah A. 53 KMT. Pertikaian

adalah tertumpu kepada undang-undang awam dalam ketiadaan bidang kuasa statutori bagi JAIP dan pelanggaran kaedah-kaedah keadilan asasi. **A**

(5) Ia adalah satu proposisi terbukti bahawa kegagalan untuk mematuhi A. 53 KMT akan menyebabkan penyalahgunaan proses mahkamah di mana tuntutan boleh dibatalkan. **B**

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC (**refd**)

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2006] 3 CLJ 207 CA (**refd**) **C**

Lim Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain [1996] 3 CLJ 231 HC (**refd**)

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaikh Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC (**refd**) **D**

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur [1997] 4 CLJ Supp 419 HC (**refd**)

O'Reilly v. Mackman [1982] 3 All ER 1124 (**refd**)

Saravanan Thangathoray v. Subshini Rajasingam & Another Appeal [2007] 2 CLJ 451 CA (**refd**)

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor [1999] 2 CLJ 5 FC (**refd**) **E**

Wan Khairani Wan Mahmood v. Ismail Mohamad & Anor [2007] 6 CLJ 582 CA (**refd**)

Legislation referred to:

Administration of The Religion of Islam Enactment (Perak) 2004, ss. 50, 67(2), 89, 91 **F**

Federal Constitution, arts. 73, 74, 121(1A)

Rules of the High Court 1980, O. 18, rr. 19(1)(b), (d), O. 53 rr. 2(2), (3)

For the appellant - Zainul Rijal Abu Bakar (Nur Syazwani Rosli with him); M/s Zainul Rijal Talha & Amir **G**

For the respondents - Mohd Fitri Asmuni; M/s Awi & Co

[Editor's note: For the High Court judgment, please see Mohamed Suffian Ahmad Shazali v. Majlis Agama Islam Dan Adat Melayu Perak Darul Ridzuan & Anor [2012] 1 LNS 1245.] **H**

Reported by Ashok Kumar

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A JUDGMENT

Mohamad Ariff Yusof JCA:

Introduction And Background Facts

B [1] Majlis Agama Islam dan Adat Melayu Perak Darul Ridzuan
("MAIP"), the appellant here, appeals against the decision of the
learned Judicial Commissioner of the High Court, Ipoh, who
dismissed with costs the appellant's application by summons in
chambers to set aside the plaintiff's writ of summons and
C statement of claim under O. 18 r. 19(1)(b) and/or (d) of the Rules
of the High Court 1980. The application appears as encl. 7 in the
court record (pp. 55 - 57 of the appeal record, vol. 1). The
subject matter of the action concerns the termination of the
respondent's (the plaintiff in the court below) appointment as
D Pengerusi Jawatankuasa Kariah bagi Masjid Al-Aulia ("Pengerusi"),
as appears in the pleaded case, in particular para. 4 of the
statement of claim.

E [2] The plaintiff/respondent had been appointed to this position
by MAIP by a letter of appointment dated 30 November 2009 for
a duration of three years commencing 1 July 2009 until 30 June
2012. This appointment letter was however superseded by another
letter dated 13 June 2011 which purportedly terminated the
plaintiff's appointment and appointed another person (Syed
F Alaudin bin Syed Daud, the second defendant) to replace the
plaintiff as the Pengerusi of Masjid Al-Aulia, effective from 21 April
2011 to 30 June 2012. This subsequent letter was not sent by
MAIP but by Jabatan Agama Islam Negeri Perak ("JAIP").

G The Plaintiff's/Respondent's Pleded Case

H [3] As part of his pleaded case, the plaintiff averred that he
came to know the reason provided for the new appointment was
that he had allegedly resigned as the Pengerusi. He denies this
allegation. The plaintiff maintains he continues to remain as the
Pengerusi since his appointment was made by MAIP. The
termination by JAIP is therefore unlawful, null and void. He further
claims the process for his purported termination as the Pengerusi
was unconstitutional, and in breach of natural justice, he not being
accorded any right of prior hearing. He argues the purported
I termination was, as a result, oppressive, since he had not been in
breach of any law when performing his duties as the Pengerusi.

[4] This is how he has pleaded these various averments in his statement of claim: A

9. Plaintiff juga menegaskan bahawa Plaintiff masih tetap lagi merupakan Pengerusi Masjid tersebut yang sah di sisi undang-undang kerana perlantikan Plaintiff sebagai Pengerusi Masjid tersebut telah dibuat oleh Defendan pertama dan bukannya oleh JAIP. B

10. Plaintiff sekali lagi menegaskan bahawa JAIP tidak mempunyai sebarang otoriti dan/atau bidang kuasa untuk menamatkan perkhidmatan Plaintiff sebagai Pengerusi Masjid tersebut dan menyatakan sebagai menyalahi undang-undang kerana bertindak di luar bidang kuasa JAIP menamatkan perlantikan Plaintiff sebagai Pengerusi Masjid tersebut sedangkan perlantikan Plaintiff sebagai Pengerusi Masjid tersebut tidak mempunyai sebarang kaitan dengan JAIP. Justeru, Plaintiff menegaskan bahawa penamatan Plaintiff sebagai Pengerusi Masjid tersebut oleh JAIP adalah tidak sah, terbatal dan tertolak. C D

11. Selain itu, Plaintiff turut menyatakan bahawa proses yang digunakan oleh JAIP menamatkan perlantikan Plaintiff sebagai tidak berperlembagaan kerana tindakan tersebut dibuat tanpa Plaintiff diberikan sebarang peluang untuk didengar, membela diri dan hak bersuara. E

[5] The plaintiff seeks declaratory reliefs as well as damages (general and exemplary) against the appellant in this writ action. F

Setting Aside Application By Second Defendant

[6] On the facts of this appeal, it is noteworthy that there was another application to strike out the claim made by the second defendant. That was allowed by the High Court, basically on the ground that there was no cause of action and no causal link between the plaintiff and the second defendant. This aspect of the case is not on appeal. G

Basis Of The Present Appeal H

[7] The appellant has brought and argued this appeal on a twopronged basis: (a) given the subject-matter which concerns the running of a masjid, the civil courts do not have jurisdiction to try this dispute, and (b) as an alternative ground, the action has been improperly brought as a writ action instead of a judicial review I

- A application under O. 53 of the Rules of the High Court 1980 since this is an issue of administrative law. The respondent disputes ground (a), and as for ground (b), maintains that the prayers are for declaratory relief for an action which contains private law elements, and as such it is permissible to file a claim by writ rather than a judicial review application.
- B

The High Court Decision

- [8] The High Court, in a concise decision, allowed the setting aside application by the second defendant (as earlier alluded to), but dismissed the appellant's application under O. 18 rr. 19(1)(b) and (d). The relevant part of the judgment is brief enough to quote in full below:
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- D As for the 1st defendant's application, learned counsel submitted on two issues i.e. that the Civil Court has no jurisdiction over the matter being one with regard to administration of mosques which come within the jurisdiction of the Syariah High Court and secondly, that the plaintiff ought to have filed for judicial review to quash the decision to terminate him. Time has obviously run out for the plaintiff for an order of *certiorari* and I do not see how and why the plaintiff should be disallowed to file a writ action for a declaration arising from a purported wrongful and illegal termination of his services. I take a leaf from page 118 of the case *Kamal Ariff bin Hj. Abdul Rahim v. Majlis Agama Islam Negeri Pulau Pinang* [2011] 4 MLJ 102 with facts that are on all fours with our instant case and where the Malaysian High Court Practice 2006, Desk Edition 1, was referred to and underscores the court's unlimited jurisdiction to grant a declaration under Ord. 15 r. 16 of the RHC subject only to its own discretion. A declaration can be used to ascertain and determine the rights of parties or to determine a point of law or in place of an order of *certiorari* especially where the time to apply for the prerogative order has expired. In *Ali bin Abu Backer v. Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389, it was held that the Syariah Court had no power to grant the relief applied for by the plaintiff because according to the Specific Relief Act 1950 and Ord. 15 r. 16 of the RHC, the power to grant a declaratory decree was that of the High Court. I am inclined to adopt this decision and to view the plaintiff's claim on the remedy basis rather than the subject matter which anyhow is premised upon a termination of a contract of service/employment. The order asked for is for a declaration and the Syariah Court has clearly no jurisdiction or power to grant such an order. Whether the plaintiff will succeed or not eventually is another matter.
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On a final note, the 1st defendant cannot say that the wrong procedure has been followed by not filing for judicial review and at the same time submits that this Court has no jurisdiction. The application by the 1st defendant ... is hence dismissed with costs ...

[9] From the passage taken from the judgment of the High Court, it is evident that the entire thrust of the decision seems to rest on the “unlimited” jurisdiction of the High Court to grant discretionary orders “subject only to its own discretion”. This jurisdiction, it is held, extends even to a situation when a declaratory order is made “in place of an order of *certiorari* especially where the time to apply for the prerogative order has expired”. From this premise, the learned Judicial Commissioner concludes that since only the civil courts is invested with this jurisdiction, and viewing the plaintiff’s claim on a “remedy basis” rather than “subject matter”, the Syariah High Court “has clearly no jurisdiction”. Two previous High Court decisions figure almost exclusively in the judgment: *Kamal Ariff Hj Abdul Rahim v. Majlis Agama Islam Negeri Pulau Pinang*, *supra*, and *Ali Abu Backer v. Anwar Kabir Abu Backer & Ors*, *supra*, with the first decision said to be “on all fours” with the facts of this present appeal.

[10] The second ground is given short shrift - the appellant here cannot be permitted to submit a wrong procedure is used, when in the first place they are challenging the jurisdiction of the civil courts to hear this case. For reasons to be analysed below, we are unable to fully agree with the entire reasoning of the learned Judicial Commissioner. Whilst we may agree the facts of this dispute lie within the jurisdiction of the civil courts, we do so for different reasons, which we feel, with respect, will better recognise the full breadth of the submissions of the parties. The jurisdiction to grant declaratory orders is just one of the several considerations for us to judicially consider. As for the matter of a wrong procedure being used (writ instead of judicial review application), we see no inherent inconsistency in the argument. After all, this is submitted by the appellant as an alternative argument.

[11] We now address the detailed arguments of the parties on both counts.

The Jurisdiction Argument

[12] The appellant advances the argument that it is to the subject matter of the dispute that the court should address, not the remedy, as was done by the High Court. Counsel quotes the

- A Federal Court decision in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaikh Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289 (approving *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1997] 4 CLJ Supp 419) and *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor* [1999] 2 CLJ 5; [1999] 1 MLJ 489, in support of this approach.

C [13] Counsel cites the following passage from in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaikh Zolkaffily Shaik Natar & Ors*, *supra*, which stresses the important legal point that if a legislative subject matter lies within the jurisdiction of the Syariah Court, the absence of an express provision, including any provision on remedy, in the relevant State Enactment on it, does not confer that jurisdiction on a civil court:

D By virtue of para 1 in List II of Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah Court on its wider jurisdiction over persons professing the religion of Islam even if no express provisions are provided in the Act because under Art 74 of the Federal Constitution, it is within the legislative competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the Civil Court. The fact that Plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Civil Court.

F [14] The holding of the Court of Appeal in *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2006] 3 CLJ 207 is further referred to for the proposition that “where there is a legislative jurisdiction, judicial jurisdiction follows.” For reasons to be elaborated later, this particular proposition may now have to be viewed in light of subsequent pronouncements by our courts.

H [15] The sequence of the argument articulated by the appellant is simple enough. The dispute here concerns the termination of a mosque official, “pegawai masjid”. The appointment and termination of his position are matters regulated by State Enactment and the Regulations made thereunder, which in the present case are the Enakmen Pentadbiran Agama Islam (Perak) 2004 and the Kaedah-Kaedah Jawatankuasa Kariah 1998 [Pindaan 2009].

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[16] The subject matter concerns the regulation and administration of mosques, which under the Federal Constitution lies within the legislative competency of the States. In this regard, the argument enters into the much-debated area of conflict of constitutional jurisdiction between the civil courts and the Syariah Courts, and a consideration of arts. 121 (in particular 121(1A)), 73, 74, and Lists I and II of the Ninth Schedule of the Federal Constitution.

[17] List II - the State List, it is argued, includes matters relating to mosques, as can be seen from the following excerpt from item 1 of the list:

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including **the Islamic law relating to** succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; Zakat, Fitrah and Baitumal or similar Islamic religious revenue; **mosques or any Islamic public places of worship**, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; *the constitution, organisation and procedure of Shariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law*, the control of propagating doctrines and beliefs amongst persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom. (emphasis added)

[18] As far as the relevant State Enactment is concerned, the appellant cites ss. 89 and 91 of the earlier stated Enakmen Pentadbiran Agama Islam (Perak) 2004. Section 89 reads:

(1) Bagi tia-tiap masjid di dalam Negeri Perak Darul Ridzuan hendaklah dilantik seorang atau beberapa orang Imam, Bilal dan Pembantu Bilal.

- A** (2) Bagi tiap-tiap masjid, yang ditetapkan oleh Duli Yang Maha Mulia Sultan selepas berunding dengan Majlis, Imam dan Bilal hendaklah dilantik daripada anggota perkhidmatan awam Negeri Perak Darul Ridzuan.
- B** (3) Bagi tiap-tiap masjid yang tidak ditetapkan di bawah subseksyen (2), Majlis hendaklah melantik Imam dan Bilal daripada kalangan ahli kariah masjid itu ...

[19] Section 91 of the Enactment further provides:

- C** (1) Perlantikan seseorang Pegawai Masjid selain Imam dan Bilal bagi masjid yang ditetapkan di bawah seksyen 89(2) atau disifatkan telah dilantik di bawah subseksyen 85(5) sebagai Pegawai Masjid boleh ditamatkan dengan notis bertulis oleh Majlis ...

- D** **[20]** Relying on the above provisions, the appellant submits only the Syariah Courts have jurisdiction to decide on matters relating to the appointment and termination of mosque officials. If we understand counsel for the appellant correctly, the appellant is taking the position that even persons appointed to the
- E** Jawatankuasa Kariah are “pegawai masjid”, and have to be treated on the same basis.

- F** **[21]** We have been referred to the relevant rules bearing on the appointment and termination of members of the Jawatankuasa Kariah, namely the Kaedah-Kaedah Jawatankuasa Kariah 1998 [Pindaan 2009], which has been earlier alluded to. These rules are made pursuant to s. 67(2) of the Enactment.

- G** **[22]** We feel it is very pertinent to place this present dispute in context and proper perspective, and in this regard, the exact provisions in these rules become highly significant. We quote below the relevant provisions:

Kaedah 3. Pelantikan dan keanggotaan Jawatankuasa Kariah.

- H** (1) Pegawai Tadbir Agama dan Penghulu setelah berunding dengan Orang Besar Jajahan, hendaklah mencadangkan kepada Majlis melalui Pengerusi Jawatankuasa Agama Islam, ahli Jawatankuasa Kariah bagi jawatan yang dinyatakan dalam subkaedah (2)(a) hingga (j) dalam Borang JK 1 Jadual Pertama.
- I** (2) Jawatankuasa Kariah hendaklah terdiri daripada:
- (a) Seorang Pengerusi;

- (b) Seorang Timbalan Pengerusi; **A**
- (c) Seorang Setiausaha;
- (d) Seorang Penolong Setiausaha;
- (e) Seorang Bendahari; **B**
- (f) Seorang wakil belia;
- (g) Dua orang wakil wanita;
- (h) Di mana terdapat lebih daripada satu masjid dalam sesuatu kariah seorang wakil daripada masjid yang tidak dijadikan jawatankuasa kariah; **C**
- (i) Seorang wakil daripada tiap-tiap surau di dalam sesuatu kariah;
- (j) Seorang wakil dari kalangan Imam Masjid; dan **D**
- (k) Tidak lebih daripada 5 orang biasa yang dilantik oleh Majlis ...

Kaedah 4. Kelayakan ahli Jawatankuasa Kariah.

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Seseorang adalah layak dilantik sebagai ahli Jawatankuasa Kariah jika dia -

- (a) Ahli kariah;
- (b) Berbudi pekerti tinggi; **F**
- (c) Bukan seorang yang bankrap; dan
- (d) Tidak pernah disabitkan dengan apa-apa kesalahan di bawah mana-mana undang-undang bertulis yang boleh di hukum dengan pemenjaraan selama 6 bulan atau lebih ... **G**

Kaedah 6. Tempoh pelantikan, penamatan dan peletakan jawatan ahli Jawatankuasa Kariah.

- (1) Pelantikan seseorang ahli Jawatankuasa Kariah hendaklah bagi suatu tempoh tidak melebihi 3 tahun dan Majlis boleh, pada bila-bila masa, menamatkan pelantikan tersebut tanpa memberi apa-apa sebab. **H**
- (2) Seseorang ahli Jawatankuasa Kariah boleh, pada bila-bila masa, meletakkan jawatannya melalui suatu notis bertulis yang dialamatkan kepada Pengerusi atau Setiausaha dengan satu salinan kepada Majlis.” **I**

- A “Kariah” and “Ahli Kariah” are defined:
Kaedah 2. Tafsiran.
...
- B “ahli kariah” ertinya seseorang yang secara tetap atau pada lazimnya tinggal dalam kariah masjid.
“kariah” atau “kariah masjid” berhubungan dengan masjid ertinya kawasan atau sempadan yang ditentukan di bawah seksyen 63 Enakmen di mana masjid itu berada ...
- C [23] As the context and the above-quoted provisions will testify, the present dispute filed by the respondent is not really in relation to his position as *Imam* or *Bilal* or Assistant *Imam* or Assistant *Bilal*, but is more concerned with his position as Pengerusi Jawatankuasa Kariah Masjid Al-Aulia, a position which appears to be more administrative in character, and by virtue of him principally being resident in the Kariah (a determined area in which the mosque is located).
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- E [24] The appellant argues the dispute concerns “the Islamic law relating to ... mosques ...” within the definition of item 1, List II of the Ninth Schedule of the Federal Constitution. This interpretation of item 1, we feel, may not be very correct. Properly read, the legislative competency of the States, in relation to mosques, arises not because a matter of Islamic law is involved
- F but more on the more straightforward basis that “mosques and any other Islamic public places of worship” are placed constitutionally within the legislative competency of the State Legislature. The interposition of a semi-colon instead of a comma after the following words (in particular, after the word “trust”)
- G makes this apparent:
... Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust; ...
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- I [25] The reference to “Islamic law” relates directly to Islamic law generally and more specifically to personal and family law of Muslims, including Islamic law relating to “succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trust.”

[26] Surprisingly, even counsel for the respondent has interpreted this particular part of item 1 in the same way as counsel for the appellant, but learned counsel for the respondent then proceeds to submit that the dispute at hand does not concern Islamic law relating to mosques, but is a pure matter of “private law” or “administrative law”.

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[27] As for the jurisdiction of the Syariah Court, counsel for the respondent has persuasively argued that the more recent pronouncements of our courts have laid down the proposition that legislative competency does not automatically result in judicial jurisdiction. In other words, although the Perak State Legislative Assembly may have legislative competency to legislate with respect to mosques and other Islamic public places of worship, this constitutional competency does not immediately translate to confer judicial jurisdiction on the Syariah Courts in Perak to decide on all matters affecting mosques and other public Islamic places of worship. For this to happen, there has to be express law passed by the State Legislature, but the available express law on the jurisdiction of the Syariah Courts in Perak, s. 50 of the Enakmen Pentadbiran Agama Islam (Perak) 2004, is limited to matters specified in that section of the Enactment. The more immediate part - the provision referring to the Syariah Court’s jurisdiction in matters of “mal” (civil law) - provides:

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50(3) Mahkamah Tinggi Syariah hendaklah -

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(a) ...

(b) dalam bidangkuasa malnya, mendengar dan memutuskan semua tindakan dan prosiding jika semua pihak dalam tindakan atau prosiding itu adalah orang Islam dan tindakan atau prosiding itu adalah berhubung dengan -

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(i) pertunangan, perkahwinan, rujuk, perceraian, pembubaran perkahwinan (fasakh), nusyuz, atau pemisahan kehakiman (faraq) atau apa-apa perkara yang berkaitan dengan perhubungan antara suami dan isteri;

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(ii) apa-apa pelupusan atau tuntutan harta yang berbangkit daripada mana-mana perkara yang dinyatakan dalam subperenggan (i);

(iii) nafkah orang-orang tanggungan, kesahtarafan, atau penjagaan atau jagaan (hadhanah) budak-budak;

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- A** (iv) pembahagian atau tuntutan sepencarian;
- (v) wasiat atau alang yang dibuat semasa marad-al-maut;
- (vi) alang semasa hidup, atau penyelesaian yang dibuat tanpa balasan yang memadai dengan wang atau nilai wang
- B** oleh seorang orang Islam;
- (vii) wakaf atau nazr;
- (viii) pembahagian dan pewarisan harta berwasiat atau tak berwasiat;
- C** (ix) penentuan orang yang berhak kepada bahagian harta pusaka seseorang si mati yang beragama Islam atau bahagian-bahagian yang kepadanya masing-masing orang itu berhak;
- D** (x) perisytiharan bahawa seseorang itu bukan lagi orang Islam;
- (xi) perisytiharan bahawa seseorang yang telah mati itu ialah seorang Islam atau sebaliknya pada masa kematiannya; dan
- E** (xii) perkara-perkara lain yang berkenaan dengannya bidangkuasa diberikan oleh mana-mana undang-undang bertulis.

- F** [28] It is plain from the wording of s. 50 of the Enactment that the Syariah High Court in Perak has no express jurisdiction to adjudicate on a matter touching and concerning the appointment and termination of the mosque officials or the members of the Jawatankuasa Kariah Masjid. As far as the case-law is concerned, we are urged by respondent's counsel to consider the decision of
- G** our courts decided after *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaikh Zolkaffily Shaik Natar & Ors*, *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* and *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor*, *supra*. We are requested in particular to
- H** consider the Federal Court decision in *Latifah Mat Zain v. Rosmawati Sharibun & Anor* [2006] 3 CLJ 207; [2007] 5 MLJ 101, as well as *Saravanan Thangathoray v. Subshini Rajasingam & Another Appeal* [2007] 2 CLJ 451; [2007] 2 MLJ 705, which, according to counsel, have abandoned the approach of "subject
- I** matter jurisdiction". We are also referred to the much earlier decision of Abdul Hamid J (as His Lordship then was) in *Lim*

Chan Seng lwn. Pengarah Jabatan Agama Islam Pulau Pinang & 1 Kes Yang Lain [1996] 3 CLJ 231; [1996] MLJU 500, which, it is said, represents the better view. A

[29] The judgment of the Federal Court in *Latifah Mat Zain, supra*, is most comprehensive. We can do no better except to adopt the following passage in the judgment (per Abdul Hamid FCJ) as representing the correct legal position: B

... What it means is that, the Legislature of a State, in making law to 'constitute' and 'organize' the Syariah Courts shall also provide for the jurisdictions of such courts within the limits allowed by item 1 of the State List, for example, it is limited only to persons professing the religion of Islam. The use of the word 'any' between the words 'in respect only of' and 'of the matters' means that the State Legislature may choose one or some or all of the matters allowed therein to be included within the jurisdiction of the Syariah Courts. It can never be that once the Syariah Courts are established the courts are seized with jurisdiction over all the matters mentioned in item 1 automatically. It has to be provided for. At the very least, the law should provide 'and such courts shall have jurisdiction over all matters mentioned in item 1 of List II – State List of the Ninth Schedule'. If there is no requirement for such provision, then it would also not be necessary for the Legislature of a State to make law to 'constitute' and 'organize' the Syariah Courts. Would there be Syariah Courts without such law? Obviously none. That is why such law is made in every State eg, Administration of Islamic Law Enactment 1989 (Selangor). C D E F

(The position in the Federal Territories is the same in this respect even though such law is made by Parliament because such law may only be made 'to the same extent as provided in item 1 of the State List ...' – item 6(e) of the Federal List). G

The point to note here is that both courts, Civil and Syariah, are creatures of statutes. Both owe their existence to statutes, the Federal Constitution, the Acts of Parliament and the State Enactments. Both get their jurisdictions from statutes i.e. Constitution, Federal law or State law, as the case may be. So, it is to the relevant statutes that they should look to determine whether they have jurisdiction or not. Even if the Syariah Court does not exist, the Civil Court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the Civil Court does not exist, the Syariah Court will still have to look at the statute to see whether it has jurisdiction over a matter or not. *Each court must determine for itself* H I

A *first whether it has jurisdiction over a particular matter in the first place, in the case of the Syariah Courts in the States, by referring to the relevant State laws and in the case of the Syariah Court in the Federal Territory, the relevant Federal laws. Just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it. So, to take the example given earlier, if one of the parties is a*
B *non-Muslim, the Syariah Court does not have jurisdiction over the case even if the subject matter falls within its jurisdiction. On the other hand, just because one of the parties is a non-Muslim does not mean that the Civil Court has jurisdiction over the case if the subject matter is not within its jurisdiction. So, there may be cases over which neither court has jurisdiction. It may be said that it cannot be so. In my view, it can be so, because either court obtains its jurisdiction from statute, not from the fact that the other court does not have jurisdiction over the matter. (emphasis added)*

D [30] As the judgment shows, the issue is not really one of which court has the jurisdiction to grant the remedy prayed - on the facts of this case, for example, which court has the jurisdiction to grant an order of declaration? There has to be two levels of judicial enquiry - first, at the level of legislative competency, and secondly, at the level of the jurisdiction of the courts. Although
E both are statutory creations, no jurisdiction can be conferred by federal law on the civil courts on matters which are within the legislative competency of the States, and *vice versa*.

F [31] In this regard, we wish to highlight another decision of our Court of Appeal in *Wan Khairani Wan Mahmood v. Ismail Mohamad & Anor* [2007] 6 CLJ 582; [2008] 1 MLJ 164, where the Court of Appeal held:

G ... when there is a challenge to jurisdiction, as here, the correct approach is firstly to see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court ...

H The question that may flow from the judgment of Abdul Kadir Sulaiman J, which we agree, would be what happens when a party may not have his remedy expressly stated in the State law pertaining to Muslim? The answer, in our view, is not for the courts to legislate and confer jurisdiction to the Civil Courts but for the State Legislature to provide the remedy. The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures ... We need therefore to give effect to the purpose or
I object of the amendment to art. 121 of the Constitution. As

correctly stated by Abdul Kadir Sulaiman, J [in *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan*] for which we agree, we requite what His Lordship said: The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the Civil Court. **A**

[32] *Wan Khairani Wan Mahmood, supra*, is a case of competing jurisdictions between the civil court and the Syariah Court. At issue was the distribution of *harta sepencarian* between a divorced couple where part of the challenged assets comprised of lands (later compensation monies, when the lands were acquired by the State Authority) bought by a company in which the former wife was the minority shareholder and the former husband the majority shareholder. It was alleged that when the lands were purchased the husband held the lands on trust for the company. A harta sepencarian claim had been earlier commenced in the Syariah Court before the former wife instituted a derivative action under company law in the civil courts to injunct the former husband (and majority shareholder) from dissipating the monies and to transfer these monies comprising proceeds from the sale of the land to the company. The institution of the civil suit in the civil court was challenged for duplicity and abuse of process. The Court of Appeal took the view that it was essential to determine the “core” of the dispute before the civil court, which did not have anything to do with the practice of Islam but more to do with the practice of companies. The civil claim was construed not as conflicting but instead as assisting the claim for harta sepencarian in the Syariah Court. **B**
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[33] In our view, a resolution of the present appeal can be approached on a similar basis, with a full appreciation that given the structure of our Federal Constitution, there could very well be areas of perceived overlapping jurisdictions between the Syariah and the civil courts. The essential issue to determine is what precisely is the “core” or putting it slightly differently, the “pith and substance” of the disputed subject matter, not so much whether the civil courts have the correct and applicable remedy. **G**
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[34] On the facts of this present appeal, the dispute is on the relatively mundane issue of whether the termination of the respondent as the Pengerusi Jawatankuasa Kariah Masjid Al-Aulia is lawful. It has little to do with Islamic law in connection with mosques. It does not even concern the qualifications of a person **I**

A to act as *Imam* or *Bilal* under Islamic law, for the respondent is not one. The subject matter concerns the administration of a mosque no doubt, but the “pith and substance” is one of administrative law, for which the Civil Courts are the proper *fori*.

B [35] We therefore uphold the decision of the learned Judicial Commissioner on this first question of jurisdiction, although on different grounds.

C [36] We now turn to the second question of whether proper procedure has been followed, namely the issue whether the respondent should have proceeded by way of a judicial review application under O. 53, instead of a writ action.

The Proper Procedure Argument

D [37] In the earlier part of this judgment, we have noted how the learned Judicial Commissioner had considered the two High Court decisions in *Kamal Ariff bin Hj Abdul Rahim v. Majlis Agama Islam Negeri Pulau Pinang*, *supra*, and *Ali bin Abu Backer v. Anwar Kabir bin Abu Backer & Ors*, *supra*, and *Kamal Ariff bin Hj Abdul Rahim v. Majlis Agama Islam Negeri Pulau Pinang*, in particular, is said to be “on all fours” with the facts of this present appeal.

F [38] We have demonstrated in the earlier section on the jurisdiction argument what exactly is involved in this appeal. This is not a termination of employment case; the respondent is claiming for a declaration of a mere “status”, ie, that he remains the lawful Pengerusi Jawatankuasa Kariah Masjid by reason of his appointment having been terminated by the wrong body (JAIP instead of MAIP) and failure of natural justice. At any rate, the respondent has not pleaded his case as an unlawful termination of employment of contract of service. In *Kamal Ariff bin Hj Abdul Rahim*, *supra*, the plaintiff was an administrative officer employed with Majlis Agama Islam Pulau Pinang who alleged that the termination of his service was unlawful and *inter alia* claimed damages for wrongful dismissal. This was essentially a case of breach of contract, a matter of private law and a matter of loss of private livelihood. The facts, with respect, are not “on all fours”; they are fundamentally different. Nor do we believe the mere inclusion of a prayer for a declaratory order can translate a matter of public law into a matter of private law. It will be

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extremely easy then for any aggrieved person in an issue of public law, to sidestep the rigours of O. 53 by the simple expedient of including a prayer for a declaration.

[39] Another aspect of the argument in favour of allowing a claim to be brought by writ is premised on the argument that the jurisdiction to grant a declaratory order is wide subject only to the court's discretion. The two cases cited by the learned Judicial Commissioner are both cases decided before amendments were made to O. 53. As the Rules of the High Court stood at the time of the hearing before the High Court, a declaratory order may even be added as a relief prayed for in an application for judicial review. So there can be no question of any injustice on account of an action brought by writ or originating summons for a declaration being struck out by reason of a wrong procedure being used. We refer in this regard to O. 53 r. 2(2) and (3), as amended, to demonstrate the point:

(2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

[40] The approach to be adopted to the private law/public law dichotomy has been authoritatively laid down by the Federal Court in *Ahmad Jefri Mohd Fahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145, such that it is no longer really necessary to expand time and space on whether the principles of *O'Reilly v. Mackman* [1982] 3 All ER 1124, applies in Malaysia and to what extent.

[41] It is now established that O. 53 sets out a specific procedure for an aggrieved person to seek a remedy against a public authority for an infringement of a right protected under

A public law. It sets out a leave requirement and a time requirement as a matter of public policy. The conditions are stringent, but there are compelling public policy reasons for these, as described by the Federal Court:

B One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties 'against groundless, unmeritorious or tardy harassment that were accorded to statutory tribunals or decision making public authorities by Ord. 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his discretion by refusing to grant a declaration ...' as described in the celebrated case of *O'Reilly v. Mackman* [1982] 3 All ER 1124 at p 1133. Further, there is also the need to reduce the delay in resolving such application in the interest of good administration. As Lord Diplock in *O'Reilly v. Mackman* reiterated, 'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision'.

[42] It is also an established proposition that a failure to comply with O. 53 results in an abuse of process for which the claim can be struck out.

[43] There could nevertheless be exceptions to the rule, such as where the dispute evidently involves a private law matter or where the plaintiff is asking for a declaration of status, or where the elements of public and private laws are present but the element of private law is more predominant. In any event, each case is very much "fact based". This is how the Federal Court has analysed the issues:

H We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of Ord. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under Ord. 53 of the RHC must

be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under Ord. 53 of the RHC is not suitable. Aside from this, there could be other circumstances like the kind in YAB Dato' Dr. Zambry. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of Ord. 53 of the RHC to proceed in another form. To say that it is open to any applicant seeking judicial review to elect any mode he prefers, as implied in Kuching Waterfront, would, in our considered opinion, be rendering Ord. 53 of the RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration then this rule must be adhered to except in the limited and exceptional circumstances discussed.

[44] Based on these principles and the exhortation that a court has to be circumspect in allowing a public law matter to be proceeded by a procedure other than an application for judicial review, and considering the total circumstances of this case and the nature of the respondent's claim, although couched in the language of applying for a declaration of "status", we are of the considered opinion that this is a case that should have been filed as an application for judicial review under O. 53 of the Rules of the High Court 1980. There is absent any significant private law element, and is almost wholly exclusively centred on a public law argument on absence of statutory jurisdiction (on the part of JAIP) and breach of the rules of natural justice. In the circumstances, and for these reasons, we are constrained to depart from the decision of the High Court, and to therefore set aside the order of the Judicial Commissioner. We therefore allow the appeal, and order that there shall be an order recorded in terms as prayed in encl. 7 (summons in chambers dated 18 November 2011) prayer 1 thereof.

[45] We are not making any order as to costs against the respondent since this appeal involves a public interest element.

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